United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

651

CONSOLIDATED JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,868

GLORIA I. NELSON, et al.,

Appellants,

v.

ELIZABETH THOMPSON SWIFT,

Appellee.

No. 20,139

GLORIA I. NELSON, et al.,

Appellants,

v.

ELIZABETH THOMPSON SWIFT,

Appellee.

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for the District of Columbia

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CONSOLIDATED JOINT APPENDIX

INDEX

JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GLORIA I. NELSON,
1435 Montana Ave., N. E.
Washington, D. C.
and
ELIZABETH FORSYTH NEVINS,
nee Elizabeth Forsyth, a Minor,
By and through her Aunt and Next Friend,
Anne G. Davis,
The Westchester,
4000 Cathedral Ave., N. W.
Washington, D. C.

PLAINTIFFS,

VS. Civil Action # 1589-58

ELIZABETH THOMPSON SWIFT
3617 Raymond Street,
Chevy Chase, Md.
% Army-Navy Air Force Register,
511 - 11th Street, N. W.
Washington, D. C.

DEFENDANT.

RELEVANT DOCKET ENTRIES

Date	Proceedings
1958	
June 19	Complaint, appearance & demand for jury trial Filed
June 19	Summons, copies (1) and copies (1) of Complaint issued ***
July 14	Summons, copy and copy of complt. issued vs. deft. ***
Aug. 7	Motion of deft. to quash service of process; notice; c/m 8/6/58; affidavit, P&A; M.C. 8-7-58; *** Filed
Sep. 2	Opposition of pltfs. to motion to quash; P&A; affidavit; ***

Sep. 24	Order granting motion of deft., Elizabeth Thompson Swift to quash service of process (N) Letts, J.
Oct. 23	Notice of appeal of pltfs.; copy mailed ***
Oct. 28	Cost bond on appeal of pltfs. ***
Dec. 2	Original Record on Appeal Delivered ***
Dec. 2	Receipt of Clerk, U.S. Court of Appeals for the Original Record Filed
1959	
Nov. 2	Certified copy of judgment of U.S.C.A. for D.C. affirming order appealed from; appellee to recover from appellants her taxable costs on appeal; Opinion attached. Filed
Nov. 5	Return from U.S.C.A. of original record. Filed
Nov. 9	Bill of Costs as taxed by Clerk * * *
1960	
Feb. 5	Judgment on judgment of USCA for deft vs pltfs in sum of $32.90 (N) Letts, J.
May 13	Judgment for costs paid and fully satisfied per atty for dft Filed
1961	
Jan. 9	Cause dismissed under Rule 13, as of 8-5-60 (N) (By Clerk)
1965	
Apr. 16	Motion of plaintiffs to reinstate cause. Filed
Apr. 19	Proposed order to reinstate cause denied without prejudice (fiat) (N) Sirica, J.
Aug. 3	Motion of pltffs to reinstate; ***
Aug. 9	Memorandum of P&A by deft in opposition to motion of pltffs to reinstate; c/m 8/9/65 Filed
Sept. 27	Recommendation reinstating cause (AC/N) Assistant Pretrial Examiner
Sept. 28	Objections of deft to Pretrial Examiner's order reinstating cause; ***
Oct. 21	Order sustaining objections to Pretrial Examiner's Recommendation and denying motion of plaintiffs to reinstate cause (N) (AC/N) McGarraghy, J.
Oct. 22	Transcript of proceedings 10/19/65 ***
Nov. 17	Notice of Appeal by pltf from order of 10/21/65 ***

[Filed June 19, 1958]

COMPLAINT

(Personal injuries (burns) & Property Damages, sustained by Tenants in Apartment, against Landlord.)

(1) This Court has jurisdiction of the subject matter hereof, by virtue of Title 11-306, D.C. Code of Laws, 1951 Edition, as amended, and for the further reason that the relief herein sought exceeds the sum of $3,000.00.

(2) At all times herein mentioned, the defendant was the onwer of a multiple dwelling of several stories in height and containing several apartments and rooms, located at 1730 New Hampshire Ave., N.W. in the District of Columbia, and a stable in the rear of said premises which defendant had converted into an apartment, and the defendant was charged by law with the duty of keeping this dwelling and all the parts thereof, including the said converted stable apartment and including the heating, electrical system, and means of ingress and egress, in good repair, and the said apartment in habitable condition.

(3) The plaintiffs, at all times mentioned herein, were lawful tenants of the aforesaid stable-apartment located in the rear of 1730 New Hampshire Ave., N.W., by virtue of an agreement entered into between plaintiffs and defendant in September, 1955, when they took possession of said stable-apartment, which defendant leased to them on a furnished basis.

(4) On, to-wit, December 11, 1955, the said stable-apartment was caused to seriously burn and become generally afire at a time when both plaintiffs were present in said apartment and asleep, the said fire having been caused as a result of defective wiring which the defendant had had done, and of which she had or should have had notice due to complaints made to her, through her agent, servant or employee, prior thereto, from plaintiffs, of sparking upon ordinary use of electrical appliances furnished by defendant to plaintiffs' and which situation the defendant, acting by and through her agent, servant or employee had negligently and carelessly

attempted to repair; and the defendant was otherwise negligent when, in making the original conversion of the aforesaid stable into an apartment, she failed to bury certain BX cable sufficiently into the walls to render same safe, and in failing to provide a sufficient number of electrical outlets, and in other portions of the premises having too many outlets for one electrical circuit; and the defendant was also negligent in failing to properly guard against vermin, and to exterminate rats, vermin, and other pests from the garages below the said stable apartment, which would invest the said apartment, and of which the plaintiffs had repeatedly made complaint, and which vermin chewed and otherwise made unsafe, the electrical wiring in said apartment; and the defendant was also negligent in certain violations of the Building and Housing Code of the District of Columbia, and regulations thereunder which were then and there in full force and effect; and she was otherwise negligent.

(5) As a result of the aforesaid serious fire in the said stable-apartment owned and operated by the defendant, and caused by the negligence of the defendant as aforesaid, the plaintiff Gloria I. Nelson sustained third degree burns of the entire back, neck, back of the ear, both arms, backs of both legs, buttocks, and of the front of her body and on the left side thereof, for which she was hospitalized for a long period of time, and she incurred great expense for the necessary hospitalization, medical and nursing care, medications, and allied items, in an effort to secure relief from the said injuries; she suffered great mental and physical pain and anguish for a long time; she lost large sums of money from her usual occupation as an office employee, which she would otherwise have earned but for her disabilities aforesaid; and the said burns and injuries have left her with permanent scarring to the various parts of her body, limbs and head affected, which are disfiguring and humiliating and embarrassing to her; and she sustained a large loss to certain personal property of hers which was then and there located in the said apartment, which was destroyed by the said fire; and she was otherwise injured and damaged.

The plaintiff, Elizabeth Forsyth Nevins, nee Elizabeth Forsyth, a minor under the age of 21 years, sustained second and third degree burns of the buttocks, legs, feet, thighs, front and back of the lower legs, and also the right side in front up to the elbow, on the right arm, which burns have resulted in permanent, disfiguring scars, which are, have been, and will continue to be humiliating and embarrassing to said plaintiff; she was hospitalized for a long period of time, and incurred great expense for her necessary hospitalization, medical, nursing, medication and allied attention in an effort to be cured of her said injuries; she suffered great mental and physical pain and anguish for a long period of time; she lost large sums of money from her usual employment which she would otherwise have earned, but for such disability resulting from her injuries; and she sustained a large loss due to certain personal property of hers, then and there in the said apartment, mainly clothing, which was destroyed by the said fire.

WHEREFORE, the premises considered, the plaintiff Gloria I. Nelson, brings this action, and demands judgment against the defendant in the full sum of $75,000.00, besides the taxable costs of this proceeding; and

WHEREFORE, the plaintiff, Elizabeth Forsyth Nevins, nee Elizabeth Foysyth, a minor under the age of 21 years, brings this action, by and through her aunt and next friend, Anne G. Davis, and demands judgment against the defendant in the full sum of $75,000.00, besides the taxable costs of this proceeding.

/s/ Earl H. Davis
Attorney for Plaintiffs

* * *

DEMAND FOR JURY TRIAL

Plaintiffs demand trial by jury of all issues herein.

/s/ Earl H. Davis
Attorney for Plaintiffs

[Filed April 16, 1965]

MOTION TO REINSTATE CAUSE OF ACTION

Comes now the plaintiffs, by and through their counsel of record, and respectfully moves this Court for an order reinstating this cause from the dismissal thereof under Rule 13 without prejudice which occurred on January 9, 1961, and as reason therefor states to this Court as follows:

1. That upon the issuance of the original summons in this cause, the U.S. Marshal made a return — "Elizabeth Thompson Swift is not to be found in my District. In Europe. Will return in about 2 years."

2. Said return by the U.S. Marshal was on July 10, 1958. On July 21, 1958, upon the issuance of an alias summons, the U.S. Marshal made a return that he had served the defendant herein by serving a copy of the complaint and summons on Paul Smith Carter, agent, personally, on July 18, 1958.

3. Thereafter the defendant, by counsel, "appearing specially and without submitting to the jurisdiction of the Court," moved to quash the said service of process.

4. On September 24, 1958, the late Judge Letts, of this Court, granted said motion.

5. On October 23, 1958, the plaintiffs appealed from said action to the United States Court of Appeals for this Circuit.

6. On October 15, 1959, the said U.S. Court of Appeals reluctantly affirmed the decision of the lower court (106 U.S. App. D.C. 238, 271 F.2d 504), and in doing so, stated:

> "Many states have statutes authorizing substituted service upon a non-resident property owner for private civil actions arising out of the property. Whether such a statute should be enacted for the District of Columbia is a matter which might well receive the consideration of Congress."

7. During all of this time the defendant has been continuously in Europe, touring the Continent with her husband, who is a concert artist (baritone).

8. In a companion case growing out of the same tort and against the same defendant, i.e. — Civil Action No. 1608-58, Deaner v. Swift, the U.S. Marshal in a return on an alias summons therein, returned — on February 26, 1965 — "Moved out of country."

9. The said defendant has just recently returned to the United States, and is presently living at 5306 Reno Road, N.W. in the District of Columbia, and has been served as of March 15, 1965 in said Deaner action.

10. By virtue of Title 12-205, D.C. Code, absence from the jurisdiction tolls the applicable statute of limitations.

11. Since the dismissal aforesaid, under Rule 13, was without prejudice, and "for failure to prosecute"; and since these plaintiffs could not "prosecute" their action without having personal service upon the said defendant, pursuant to the mandate of the U.S. Court of Appeals; and since they could not obtain such "personal" service upon the defendant while she was in Europe, it is respectfully submitted that this motion should be granted, and the action reinstated.

Respectfully submitted,

/s/ Earl H. Davis
Attorney for Plaintiffs

* * *

[Filed April 19, 1965]

(PROPOSED)
ORDER REINSTATING CAUSE

This matter having come on before the Court on the _____ day of April, 1965, pursuant to the Motion of the plaintiffs to have their cause of action reinstated after its dismissal under Rule 13 of this Court without prejudice, for failure to prosecute, and the Court having found that good cause has been shown to have the same reinstated, it is by the Court, this _____ day of April, 1965,

ORDERED, that the plaintiffs' Motion to Reinstate this action be, and the same hereby is, granted, and the action is hereby reinstated.

_____
U.S. District Judge

DENIED WITHOUT PREJUDICE

4/19/65 /s/ John G. Sirica

[Filed August 3, 1965]

MOTION TO REINSTATE CAUSE OF ACTION

Comes now the plaintiffs, by and through their counsel of record, and respectfully moves this Court for an order reinstating this cause from the dismissal thereof under Rule 13 without prejudice which occurred on January 9, 1961, and as reason therefor states to this court as follows:

1. That upon the issuance of the original summons in this cause, the U.S. Marshal made a return — "Elizabeth Thompson Swift is not to be found in my District. In Europe. Will return in about 2 years."

2. Said return by the U.S. Marshal was on July 10, 1958. On July 21, 1958, upon the issuance of an alias summons, the U.S. Marshal made a return that he had served the defendant herein by serving a copy of the complaint and summons on Paul Smith Carter, agent, personally, on July 18, 1958.

3. Thereafter the defendant, by counsel, "appearing specially and without submitting to the jurisdiction of the Court", moved to quash the said service of process.

4. On September 24, 1958, the late Judge Letts, of this Court, granted said motion.

5. On October 23, 1958, the plaintiffs appealed from said action to the United States Court of Appeals for this Circuit.

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10. By virtue of Title 12-205, D.C. Code, absence from the jurisdiction tolls the applicable statute of limitations.

11. Since the dismissal aforesaid, under Rule 13, was without prejudice, and "for failure to prosecute"; and since these plaintiffs could not "prosecute" their action without having personal service upon the said defendant, pursuant to the mandate of the U.S. Court of Appeals; and since they could not obtain such "personal" service upon the defendant while she was in Europe, it is respectfully submitted that this motion should be granted, and the action reinstated.

Respectfully submitted,

/s/ Earl H. Davis
Attorney for Plaintiffs

* * *

[Certificate of Service]

[Filed September 27, 1965]

RECOMMENDATION OF PRETRIAL EXAMINER

Upon consideration of plaintiffs' motion to reinstate cause of action, the opposition thereto, and oral argument thereon, it is this 24th day of September, 1965,

RECOMMENDED that said motion be granted.

/s/ Elizabeth Bunten
ASST. PRETRIAL EXAMINER

NOTE: Under Local Civil Rule 9(i)(1) the above Recommendation becomes the order of the Court unless objections thereto are filed within five days in conformity with Rule 9(i)(2).

COPIES TO COUNSEL (by mail) 9/24/65 /s/ E.B.

[Filed September 28, 1965]

OBJECTIONS TO THE PRETRIAL EXAMINER'S ORDER

Defendant objects to the recommendation of the Pretrial Examiner dated September 24, 1965 that the Motion to Reinstate the above cause be granted and for reasons therefor says:

1. This case was dismissed without prejudice for the failure of plaintiffs to prosecute as of August 5, 1960 and no action has been taken to reinstate it since that time up to the filing of a similar motion and order without service on defendant which was denied April 19, 1965.

2. Plaintiffs deliberate choice to abandon this case as defendant was out of the jurisdiction is not disputed and hence, there is no basis for relief under Rule 60(b) F.R.C.P.

3. For other reasons set forth more fully in Memorandum of Points and Authorities in opposition to reinstate cause of action filed herein on August 9, 1965.

PLEDGER, EDGERTON & MAHONEY

By /s/ John F. Mahoney, Jr.
* * *
Attorneys for defendant

[Certificate of Service]

[Filed October 22, 1965]

TRANSCRIPT OF PROCEEDINGS

Washington, D. C.
October 19, 1965

The above-entitled cause came on for hearing on Defendant's Objections to Pretrial Examiner's Order before the HONORABLE JOSEPH C. McGARRAGHY, United States District Judge.

APPEARANCES:

EARL H. DAVIS, Esq., Counsel for Plaintiff

JOHN F. MAHONEY, JR., Esq., Counsel for Defendant

PROCEEDINGS

THE CLERK: Number 12, Nelson v. Swift.

MR. MAHONEY: Good morning, Your Honor. I don't see my opposing counsel here.

THE COURT: I was wondering. Is Mr. Davis opposing counsel in the case?

MR. MAHONEY: He is opposing counsel.

THE COURT: Have you heard anything from him as to whether or not he will be here?

MR. MAHONEY: No, I have not.

THE COURT: Do you have anything?

THE CLERK: Notice was mailed on the 6th of October to Mr. Mahoney and Mr. Davis at his address in the Federal Bar Building.

MR. MAHONEY: That is correct.

THE CLERK: It has not been returned.

THE COURT: I will proceed with the motion.

MR. MAHONEY: The matter before the Court is our objections to the Pretrial Examiner's order in reinstating a cause of action.

The Defendant opposed the motion of the Plaintiffs to reinstate the cause of action for the reason that it was dismissed without prejudice for failure of the Plaintiffs to prosecute over five years ago, as of August of

1960, and that no action was taken by or on behalf of the Plaintiffs until a motion, a similar motion and order was filed, without service on counsel for the Defendant, which was denied in April, April 19, 1965.

Now the Plaintiffs apparently attempt to seek relief under the order of dismissal under Rule 60(b) of the Federal Rules of Civil Procedure, which sets forth six reasons which give the Court a right to set aside a dismissal. The first three, which involve mistake, inadvertence, newly-discovered evidence and fraud are all subject to a one-year statute of limitations. But the last reason, which is number six, provides that the Court may set aside a dismissal for any reason justifying relief from the operation of the judgment.

Now this rule has been interpreted by the Supreme Court and other courts to have two prerequisites, because this is actually asking for extraordinary relief. The first prerequisite is that the motion must be made within a reasonable time. Now, based upon the record, this was not done here. Secondly, that extraordinary circumstances must be shown. And the latter was demonstrated in a case before the Supreme Court in Ackerman v. The United States.

Now, the Court there went on to say that what is necessary under the rule is not mere neglect but something which would in a sense create extraordinary circumstances. But the Court even in the Ackerman case said that free and deliberate choices, such as was done here, would not constitute extraordinary circumstances.

Now, what the Plaintiffs' attorney did in this case was this: There was a motion to quash service of process which was sustained in the court below and affirmed.

THE COURT: Unless you are stating this for the record, I am familiar with what has gone on because I have read the file in the case, Mr. Mahoney. You don't need to elaborate unless for some reason of your own you want to state it for the record.

MR. MAHONEY: No, I just wanted to perhaps emphasize the Plaintiffs' attorney's inaction. There were means available to him if he wanted

to continue the action here. He could have filed a motion to extend the time under Local Rule 13, which would have prevented a dismissal. There was also a means by which he could have issued alias summonses to prevent a dismissal.

Here, as soon as the case came down from the Court of Appeals and it was dismissed, nothing was done. In a sense, it was abandoned. Now the Plaintiffs' attorney is coming back and saying the Defendant has returned to the District, I would like to reinstate an action which was dismissed over five years ago.

I submit there is no legal basis for a reinstatement of this cause of action at this time.

THE COURT: According to my notes in this case, the action was dismissed as of August 5, 1960, notation of which was filed January 9, 1961.

MR. MAHONEY: Yes, Your Honor. Nothing was done in the matter until a motion to reinstate was filed April 16, 1965, which was four years and three months after the dismissal; and that motion to reinstate was denied.

THE COURT: Here is Mr. Davis now.

Mr. Davis, we are hearing your motion.

MR. DAVIS: I called, Your Honor, and I was advised I was Number 12 on Your Honor's list.

THE COURT: We move right fast. You missed the benefit of Mr. Mahoney's argument and almost missed the benefit of my ruling.

I will be glad to hear you.

MR. DAVIS: If the Court please, you are undoubtedly aware from the motion this is an objection to the ruling of the Pretrial Examiner reinstating this action not to the calendar but for the purpose of issuing a summons.

In a companion case, which I have before me, 1608-58 --

THE COURT: I am familiar with that case.

MR. DAVIS: -- service was not effected in this case until March of this year. I think it is six of one and a half dozen of another.

THE COURT: In that case didn't they do something to keep the case alive by issuing alias summonses from time to time?

MR. DAVIS: I don't think the law requires you to.

THE COURT: I asked you, didn't they do that?

MR. DAVIS: They did, yes, but the return came back, "Non est" every time it was issued, knowing full well the Defendant was in Europe. The next-to-last return of the Marshal shows she is still in Europe.

THE COURT: What is the difference between the motion before me today and the motion passed on by Judge Sirica three or four months ago?

MR. DAVIS: It is the identical motion.

THE COURT: Word-for-word?

MR. DAVIS: It is, Your Honor, but in the motion before Judge Sirica
7 it was ex parte because -- taking the position Your Honor is familiar with the history of this matter -- it originally came on on appeal --

THE COURT: I am familiar with it.

MR. DAVIS: -- from a ruling of Judge Letts quashing service. When service was quashed, there was no defendant in the case. So when I filed the motion to reinstate, I assumed there would be no counsel in the case and no defendant in the case because at that time there was no service of process. I did not mail Mr. Mahoney a copy of the motion.

THE COURT: Even on an ex parte hearing, Judge Sirica denied it.

MR. DAVIS: But without prejudice.

THE COURT: I don't know what that means.

MR. DAVIS: I assumed it to mean without prejudice to refiling it; and that is what I did and then served Mr. Mahoney a copy of it.

Then on a full hearing before the Pretrial Examiner, the motion was granted. Now we are before Your Honor on objections to the ruling of the Pretrial Examiner.

Obviously, if this is not sustained, I would have the right -- again assuming or interpreting what is meant by "without prejudice" -- to file

a new suit. In the interest of saving time and going through all that again, giving it a new number, we are accomplishing the same thing by simply issuing process on the pending case. There still has been no service. All I am asking is that it be reinstated to the Court docket whereupon I will have to issue a summons and have the Marshal go out and serve it. The Defendant is now in the District.

THE COURT: You had available to you during this more than four-year period several procedures that would have made it possible to keep the case alive. You could have issued alias summonses from time to time. You could have filed a motion to stay Rule 13. After the dismissal under Rule 13, you could have filed a motion to reinstate.

None of these things were done. The case was in the posture of being abandoned for a period of over four years. In my opinion, the case is stale and I think the Pretrial Examiner's ruling was erroneous. I will sustain objection to the Pretrial Examiner's ruling.

MR. DAVIS: May the record show an exception to Your Honor's ruling?

THE COURT: Yes.

(Whereupon the hearing on the motion was concluded.)

[Filed October 21, 1965]

ORDER DENYING MOTION
TO REINSTATE CAUSE

This case, having come on for hearing on the objections to the pre-trial examiner's order dated September 24, 1965, which recommended that the motion of plaintiffs to reinstate the above cause be granted and, after consideration of said plaintiffs' motion, memorandum of points and authorities in opposition thereto and after argument in open Court, it is this day of October, 1965,

ORDERED, that the objections to the pretrial examiner's order be, and they hereby are, sustained, and it is further

ORDERED, that the motion of plaintiffs to reinstate cause be, and it is hereby is, denied.

BY THE COURT,

/s/ Joseph C. McGarraghy
Judge

Presented by:

PLEDGER, EDGERTON & MAHONEY

By /s/ John F. Mahoney, Jr.
* * *
Attorneys for defendant

[Certificate of Service]

[Filed November 17, 1965]

NOTICE OF APPEAL

Notice is hereby given this 17th day of November, 1965, that plaintiffs, Gloria I. Nelson and Elizabeth Forsyth Nevins, etc. hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 21st day of October, 1965 in favor of defendant, in sustaining objections to Pre-trial Examiner's Recommendation, and denying Motion to Reinstate cause of action, against said plaintiffs.

/s/ Earl H. Davis
Attorney for Plaintiffs
* * *

OPPOSING COUNSEL TO BE NOTIFIED:

John F. Mahoney, Jr., Esq.,
925 Washington Building,
Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GLORIA I. NELSON,
1435 Montana Ave., N. E.
Washington, D. C.
and
ELIZABETH FORSYTH NEVINS,
nee Elizabeth Forsyth, A Minor,
By and through her Aunt and Next
Friend, Anne G. Davis,
The Westchester,
4000 Cathedral Ave., N. W.
Washington, D. C.

Plaintiffs,

vs.

ELIZABETH THOMPSON SWIFT,
5306 Reno Road, N. W.
Washington, D. C.

Defendant.

Civil Action No. 2616-'65

RELEVANT DOCKET ENTRIES

Date	Proceedings
1965	
Oct. 20	Deposit for cost
Oct. 20	Complaint, appearance Jury Demand
Oct. 20	Summons, copies (1) and copies (1) of Complaint issued ***
Nov. 9	Motion of defendant to dismiss complaint, c/m 11-8-65, affidavit; P&A; MC; Appearance of Pledger, Edgerton & Mahoney, Filed
Nov. 17	Opposition of plaintiffs to motion to dismiss; c/m 11-16-65 Filed
Dec. 27	Order denying motion of defendant to dismiss complaint. (N) Corcoran, J.

Date	Proceedings
1966	
Jan. 5	Answer of defendant to complaint, c/m 1-4-66, ***
Jan. 5	Calendared (N) AC/N
Jan. 5	Interrogatories by defendant to plaintiffs, *** Filed
Jan. 21	Answer of plaintiffs to interrogatories *** Filed
Feb. 4	Motion of defendant for summary judgment, P&A, statement *** Filed
Feb. 24	Opposition of plaintiff to motion for summary judgment; points and authorities; ***
March 2	Motion of defendant for summary judgment argued and submitted. *** Sirica, J.
March 10	Order granting defendant's motion and entering judgment for defendant (N) Sirica, J.
March 16	Notice of appeal by plaintiffs from order of 3/10/66 ***

[Filed October 20, 1965]

COMPLAINT
(Personal Injuries (burns) & Property Damages, sustained by Tenants in Apartment, against Landlord.)

(1) This Court has jurisdiction of the subject matter hereof, by virtue of Title 11-306, D.C. Code of Laws, 1951 Edition, as amended, and for the further reason that the relief herein sought exceeds the sum of $3,000.00.

(2) At all times herein mentioned, the defendant was the owner of a multiple dwelling of several stories in height and containing several apartments and rooms, located at 1730 New Hampshire Ave., N.W. in the District of Columbia, and a stable in the rear of said premises which defendant had converted into an apartment, and the defendant was charged by law with the duty of keeping this dwelling and all the parts thereof, including the said converted stable apartment and including the heating, electrical system, and means of ingress and egress, in good repair, and the said apartment in habitable condition.

(3) The plaintiffs, at all times mentioned herein, were lawful tenants of the aforesaid stable-apartment located in the rear of 1730 New Hampshire Ave., N.W., by virtue of an agreement entered into between plaintiffs and defendant in September, 1955, when they took possession of said stable-apartment, which defendant leased to them on a furnished basis.

(4) On, to-wit, December 11, 1955, the said stable-apartment was caused to seriously burn and become generally afire at a time when both plaintiffs were present in said apartment and asleep, the said fire having been caused as a result of defective wiring which the defendant had had done, and of which she had or should have had notice due to compalints made to her, through her agent, servant or employee, prior thereto, from plaintiffs, of sparking upon ordinary use of electrical appliances furnished by defendant to plaintiffs; and which situation the defendant, acting by and through her agent, servant or employee had negligently and carelessly attempted to

repair; and the defendant was otherwise negligent when, in making the original conversion of the aforesaid stable into an apartment, she failed to bury certain BX cable sufficiently into the walls to render same safe, and in failing to provide a sufficient number of electrical outlets, and in other portions of the premises having too many outlets for one electrical circuit; and the defendant was also negligent in failing to properly guard against vermin, and to exterminate rats, vermin, and other pests from the garages below the said stable-apartment, which would infest the said apartment, and of which the plaintiffs had repeatedly made complaint, and which vermin chewed and otherwise made unsafe, the electrical wiring in said apartment; and the defendant was also negligent in certain violations of the Building and Housing Code of the District of Columbia, and regulations thereunder which were then and there in full force and effect; and she was otherwise negligent.

(5) As a result of the aforesaid serious fire in the said stable-apartment owned and operated by the defendant, and caused by the negligence of the defendant as aforesaid, the plaintiff Gloria I. Nelson sustained third-degree burns of the entire back, neck, back of the ear, both arms, backs of both legs, buttocks, and of the front of her body and on the left side thereof, for which she was hospitalized for a long period of time, and she incurred great expense for the necessary hospitalization, medical and nursing care, medications, and allied items, in an effort to secure relief from the said injuries; she suffered great mental and physical pain and anguish for a long time; she lost large sums of money from her usual occupation as an office employee, which she would otherwise have earned but for her disabilities aforesaid; and the said burns and injuries have left her with permanent scarring to the various parts of her body, limbs and head affected, which are disfiguring and humiliating and embarrassing to her; and she sustained a large loss to certain personal property of hers which was then and there located in the said apartment, which was destroyed by the said fire; and she was otherwise injured and damaged.

The plaintiff, Elizabeth Forsyth Nevins, nee Elizabeth Forsyth, a minor under the age of 21 years, sustained second and third degree burns of the buttocks, legs, feet, thighs, front and back of the lower legs, and also the right side in front up to the elbow, on the right arm, which burns have resulted in permanent, disfiguring scars, which are, have been, and will continue to be humiliating and embarrassing to said plaintiff; she was hospitalized for a long period of time, and incurred great expense for her necessary hospitalization, medical, nursing, medication and allied attention in an effort to be cured of her said injuries; she suffered great mental and physical pain and anguish for a long period of time; she lost large sums of money from her usual employment which she would otherwise have earned, but for such disability resulting from her injuries; and she sustained a large loss due to certain personal property of hers, then and there in the said apartment, mainly clothing, which was destroyed by the said fire.

WHEREFORE, the premises considered, the plaintiff Gloria I. Nelson brings this action, and demands judgment against the defendant in the full sum of $75,000.00, besides the taxable costs of this proceeding; and

WHEREFORE, the plaintiff, Elizabeth Forsyth Nevins, nee Elizabeth Forsyth, a minor under the age of 21 years, brings this action, by and through her aunt and next friend, Anne G. Davis, and demands judgment against the defendant in the full sum of $75,000.00, besides the taxable costs of this proceeding.

/s/ Earl H. Davis
Attorney for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs demand trial by jury of all issues herein.

/s/ Earl H. Davis
Attorney for Plaintiffs

* * *

[Filed November 9, 1965]

MOTION TO DISMISS COMPLAINT

Defendant moves the Court to dismiss the complaint in the above entitled cause on the ground that the claims asserted therein accrued more than three years before the filing of the present complaint and are, therefore, barred by the Statute of Limitations.

Although defendant was absent from this jurisdiction for periods from the date the cause of action accrued until the filing of this complaint, which plaintiff will claim tolled the running of the statute, she was here, as reflected in her affidavit, attached hereto and marked Exhibit A, for four years and one month since the cause of action accrued.

PLEDGER, EDGERTON & MAHONEY

By /s/ John F. Mahoney, Jr.
* * *
Attorneys for defendant

[Certificate of Service]

[Filed November 9, 1965]

AFFIDAVIT OF ELIZABETH THOMPSON SWIFT

I, ELIZABETH THOMPSON SWIFT, being first duly sworn under oath, depose and say that I am the defendant in the above cause and that on December 11, 1955, the date of the fire referred to in the complaint, I was residing at 305 Raymond Street, Chevy Chase, Maryland; that in June 1956, I moved into an apartment at 1730 New Hampshire Avenue, N.W., Washington, D.C.; that in August 1956, my husband and I purchased a home at 3710 McKinley Street, N.W., where we resided until June 6, 1958; that on that day we sailed for England, spending the summer of 1958 outside of London; that on September 1, 1958, we went to Holland, where we lived until August 30, 1963; that on September 1, 1963, after returning

to the United States, we moved into 4000 Massachusetts Avenue, N.W., Washington, D.C., where we lived until we purchased our present home at 5306 Reno Road, Washington, D.C., in March 1964, and we have been living there since that time.

From December 11, 1955, until October 20, 1965, the date of the filing of the present complaint, I spent a total of 4 years, 1 month, as a resident of the District of Columbia.

/s/ Elizabeth Thompson Swift

[JURAT the 5th day of November, 1965]

[Filed November 17, 1965]

POINTS & AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS

Comes now the plaintiffs in the above matter, by and through counsel, and respectfully oppose the defendant's pending motion to dismiss, for the following reasons:

1. Said motion is tantamount to a motion for summary judgment, because, if granted, it will conclusively end this litigation.

2. The motion is based upon questions of fact, which will involve the question of credibility of the defendant herself, and credibility is a question of fact for a jury's determination, not for the court.

3. The defendant's affidavit submitted in support of this motion cannot be cross-examined, and is purely self-serving.

4. Counsel refers the Court to his own affidavit, filed in Civil Action No. 1589-58 (same parties, same cause of action), which contradicts the defendant's affidavit, and involves other persons who would similarly contradict the defendant.

5. The June, 1955 C & P Telephone Directory lists Garfield Swift, husband of this defendant, as living at 3617 Raymond Street, Chevy Chase, Md., the defendant herself not being listed by her own name.

6. The July, 1956 C & P Telephone Directory lists Garfield Swift, husband of this defendant, as living at 3617 Raymond Street, Chevy Chase, Md., the defendant herself not being listed by her own name.

7. The License Officer of No. 3 Precinct, within which precinct is located the property involved in the tort herein, will testify that the defendant was listed on his records as a non-resident property owner, her residence being 3617 Raymond Street, Chevy Chase, Md.

8. The 1955 Maryland Suburban Washington Directory of the R. L. Polk Company, at p. 871 thereof, lists as residents of 3617 Raymond Street, Chevy Chase, Md. — "Garfield C. (Eliz. T.) Swift"; and at p. 1433 of the said Directory the said Garfield Swift is listed as "owner" of said premises.

9. The 1962, 1963 and 1964 issues of the R. L. Polk Washington D.C. City Directory lists the owner and occupant of premises 5306 Reno Road, N.W., as "John R. Bromell."

10. The 1965 Washington D.C. City Directory (just published) is the first issue which lists this defendant as a resident of the District of Columbia, where, at page 1416 the listing "Swift, Garfield (Eliz.) concert singer, h. 5306 Reno Rd., N.W." appears; and at page 453 of the street directory of the same issue "Garfield Swift" is listed as the owner thereof.

11. The apartment house licensing records of the District Building also show this defendant to have been a non-resident of the District of Columbia at the time this cause of action arose on December 11, 1955.

ARGUMENT & AUTHORITIES

12-303 (a), D.C. Code, provides:

"When a person who is a resident of the District of Columbia is out of the District or has absconded or concealed himself at the time a cause of action accrues against him, the period limited for the bringing of the action does not begin to run until he comes into the District or while he is so absconded or concealed." (underlining ours).

The defendant herself admits, in her affidavit, that she was not a resident of the District of Columbia at the time this cause of action accrued to plaintiffs. Although service of process was attempted against her at her place of employment in the District (See record in C.A.#1589-58), same was not successful, whereupon her actual agent was served with process, which led to the appellate action in C.A.#1589-58, at which time she was admittedly in Europe.

Plaintiffs would have no way of knowing that a resident of Maryland had temporarily occupied an apartment in the District if she was listed in neither the telephone or city directories. Nor would they know, after defendant's return from Europe, that she had again temporarily taken an apartment at 4000 Mass. Ave., N.W., unless she was either listed in the telephone or city directories.

A constant watch on a companion case against the same defendant, arising out of the same tort, i.e. — Deaner v. Swift, Civil Action #1608-58, indicates that after numerous alias summons, all of which were returned "out of the country", she was not served until March 15, 1965. The last return on the alias immediately preceding the successful one was returned by the U.S. Marshal on February 26, 1965 with the notation — "Moved out of Country."

The case of — FRANK v. ADAMS, 98 A.2d 789, affd. sub nom in 94 U.S. App. D.C. 174, 213 F.2d 198, cited by defendant in her memo, is not germane, that being an action for breach of contract made in California in March, 1946 and throughout that year the defendant resided in Cuba and continued to reside there until late in 1949, when he moved to

Ohio where he resided through 1950 and until September 1951 when he first moved into the District of Columbia. The suit was filed against him here two months later.

The case of — BANK OF ALEXANDRIA v. DYER, 39 U.S. 141, 14 Pet. 141, (Jan. Term, 1839), is totally not pertinent to the present case. In that case the Supreme Court held that "the counties of Washington and Alexandria constituting the territory of Columbia are, for purposes of the Statute of Limitations, parts of one territorial government, and one county is not 'beyond the seas' as to the other." It further held that the words "beyond the seas" in the statute of limitations are equivalent to the words "beyond the jurisdiction."

Montgomery County, Maryland, was never part of the District of Columbia, but is a completely separate jurisdiction.

In — CALVIN v. CALVIN, 94 U.S. App. D.C. 42, 214 F.2d 226 (1954) the U.S. Court of Appeals reversed the District Court for having granted summary judgment on a question involving limitation of action, stating:

> "* * * While the pleadings on their face indicate that defendant relatives were non-residents of the District at the time of trial appellant raised the issue of their having been District residents when the causes of action accrued, with subsequent absence from the District. This was a genuine issue of fact material to a decision on the question of limitation and precluded summary judgment as to such relatives."

WHEREFORE, by reason of the foregoing points, argument and authority, it is respectfully submitted that the present motion being in effect a motion for summary judgment, should be denied; and that the defendant should raise this issue in her answer on the merits.

Respectfully submitted,

/s/ Earl H. Davis
Attorney for Plaintiffs

* * *

[Certificate of Service]

[Filed December 27, 1965]

ORDER

DENYING DEFENDANT'S MOTION TO DISMISS

---*---

Upon consideration of the defendant's motion to dismiss the complaint in the above entitled cause, after argument in open Court by counsel for the respective parties, and the Court being fully advised in the premises, it is, by the Court, this 22nd day of December, 1965,

ORDERED, that the defendant's Motion to Dismiss the Complaint in the above entitled cause be, and the same hereby is, overruled and denied.

By the Court,

/s/ Howard F. Corcoran
U.S. District Judge

[Certificate of Service]

[Filed January 5, 1966]

ANSWER OF DEFENDANT TO COMPLAINT

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

Defendant admits that on the date alleged in the complaint she was the owner of an apartment house located at 1730 New Hampshire Avenue, N.W. and that on December 11, 1955 plaintiffs were lessees of an apartment in the rear of said premises; admits that a fire occurred thereat on the aforesaid date but denies that she was negligent in any of the respects alleged; and avers that she is without knowledge or information sufficient to form a belief as to the truth of the allegations pertaining to the injuries

sustained and the expenses and losses incurred; and denies each and every other allegation in the complaint not hereinbefore specifically answered.

Third Defense

The fire and the alleged consequences thereof were caused by the sole or contributory negligence of the plaintiffs, or any of them.

Fourth Defense

The claims asserted in the complaint accrued more than three years before the filing of the present complaint and are, therefore, barred by the Statute of Limitations.

PLEDGER, EDGERTON & MAHONEY

By /s/ John F. Mahoney, Jr.
* * *
Attorneys for defendant

[Certificate of Service]

[Filed January 5, 1966]

INTERROGATORIES PROPOUNDED BY DEFENDANT TO PLAINTIFFS

TO: Earl H. Davis, Esq.
504 Federal Bar Building
Washington, D. C.
Attorney for plaintiffs

The following interrogatories are propounded by defendant to plaintiffs pursuant to Rule 33 of the Federal Rules of Civil Procedure, said rule providing that interrogatories shall be answered separately and fully in writing under oath by said plaintiffs and a copy thereof served upon counsel for defendant within fifteen (15) days after service of these interrogatories upon you.

1. Do you have any knowledge or information that the defendant was not a resident of 305 Raymond Street, Chevy Chase, Maryland on December 11, 1955?

2. If the answer to Interrogatory No. 1 is in the affirmative, state the facts upon which you rely in support thereof, indicating where you claim the defendant was a resident on the date aforesaid.

3. Do you have any knowledge or information that defendant resided at places other than those set forth in her affidavit filed in this cause during the periods stated therein?

4. If your answer to Interrogatory No. 3 is in the affirmative, set forth in detail and in chronological order the places you claim Mrs. Swift resided during the period from December 11, 1955 until October 20, 1965, which are otherwise than set forth in her aforementioned affidavit.

5. Set forth all your sources of information in answering these interrogatories.

PLEDGER, EDGERTON & MAHONEY

By /s/ John F. Mahoney, Jr.
* * *
Attorneys for defendant

[Certificate of Service]

[Filed January 21, 1966]

ANSWERS OF PLAINTIFFS TO INTERROGATORIES PROPOUNDED BY DEFENDANT

Comes now the plaintiffs in the above action, Gloria I. Allen (formerly Gloria I. Nelson) and Elizabeth Forsyth Nevins, and for answers to the Interrogatories heretofore propounded by defendant, respectfully state unto the Court as follows:

1. We have no knowledge that the defendant ever resided at "305" Raymond Street, Chevy Chase, Maryland, for the reason that there is not now, nor was there on December 11, 1955, any such street number. Raymond Street runs east of 6709 Melville Place west, one block north of Bradley Lane. Our information is that on the date in question the defendant lived

2. See (1), supra.

3. NO. Nor do we have any information that she lived at the places indicated in the said affidavit, other than that she lived at numerous places in Europe from 1958 to 1965.

4. See (3), supra.

5. License Officer, No. 3 Precinct, Metropolitan Police Dept.
Department of Licenses, District Building, D. C.
Edward H. Jones Co., 5520 Conn. Ave., N. W., D. C.
Paul Smith Carter, 1730 New Hampshire Ave., N. W., D. C.
George H. Goodrich, Esq., Investment Bldg., D. C.
Earl H. Davis, Esq., Federal Bar Building, D. C.

/s/ Gloria I. Allen
formerly Gloria I. Nelson

/s/ Elizabeth Forsyth Nevins

[JURAT the 19th day of January, 1966]
[Certificate of Service]

[Filed February 4, 1966]

MOTION FOR SUMMARY JUDGMENT

Defendant moves the Court, pursuant to Rule 56 of the Federal Rules for Civil Procedure for summary judgment and for reasons therefor says:

1. The claims asserted in the complaint accrued more than three years before the filing of the present complaint and are therefore barred by the Statute of Limitations.

2. Plaintiffs have filed two actions against the same defendant for the same alleged wrong. It is well settled that pendency of a former action in the same jurisdiction between the same parties based on the same

cause of action is ground for abatement for the second cause of action.

PLEDGER, EDGERTON & MAHONEY

By /s/ John F. Mahoney, Jr.
* * *
Attorneys for defendant

TO: Earl H. Davis, Esq.
1815 H Street, N.W.
Washington, D. C.
Attorney for plaintiffs

PLEASE TAKE NOTICE that memorandum of points and authorities in support of this motion and statement of material facts are attached hereto. The rules of the Court require that if you oppose the granting of this motion you shall file with the Clerk of this Court within five (5) days of the date of service of a copy of this motion upon you, or within such further time as the Court may grant or as the parties to this suit may agree upon, the statement of points and authorities upon which you rely and serve a copy thereof upon counsel for defendant.

/s/ John F. Mahoney, Jr.

[Certificate of Service]

[Filed February 4, 1966]

STATEMENT OF MATERIAL FACTS

Defendant contends that there is no genuine issue as to the following facts:

1. On December 11, 1955, defendant was a resident of the State of Maryland.

2. Plaintiffs have no knowledge or information that defendant resided at places other than those set forth in her affidavit filed in this cause during the periods stated therein.

3. There is a prior action pending in this jurisdiction involving the same parties and the same alleged wrong now pending in the United States Court of Appeals for the District of Columbia Circuit.

PLEDGER, EDGERTON & MAHONEY

By /s/ John F. Mahoney, Jr.
* * *
Attorneys for defendant

[Filed February 24, 1966]

OPPOSITION
to
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiffs, by counsel, and respectfully oppose the defendant's Motion for Summary Judgment filed herein, for the following reasons:

1. The same points and argument were made by defendant in a pleading labelled as a "Motion to Dismiss", before Judge Corcoran, on December 21, 1965, which was denied, the Court holding there were factual issues to be resolved.

2. The pending motion is identical, only under another label.

3. Plaintiff's do not have two actions "pending" against the same defendant. The prior action, now on appeal, was abated by the Court's refusal to reinstate same. To protect plaintiffs' rights, pending determination of the appeal from said ruling, a new action was necessary, based upon the defendant's absence from the jurisdiction.

4. And for other reasons apparent from the record.

AUTHORITIES

12-303 (a), D.C. Code. CALVIN v. CALVIN, 94 U.S. App. D.C. 42, 214 F.2d 226 (1954). The record in this cause, and in Civil Action No. 1589-58 & 1608-58.

/s/ Earl H. Davis
Attorney for Plaintiffs
* * *

[Certificate of Service]

[Filed March 10, 1966]

ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT

Upon consideration of motion of defendant for summary judgment, memorandum of points and authorities in support thereof, plaintiff's opposition thereto and after argument in open Court, it is this 7th day of March, 1966,

ORDERED, that said motion be, and it hereby is, granted and judgment be, and it hereby is, entered for the defendant.

BY THE COURT,

/s/ John J. Sirica
Judge

Presented by:

PLEDGER, EDGERTON & MAHONEY

By: /s/ John F. Mahoney, Jr.
* * *
Attorneys for defendant

[Certificate of Service]

[Filed March 16, 1966]

NOTICE OF APPEAL

Notice is hereby given this 16th day of March, 1966, that Gloria I. Nelson and Elizabeth Forsyth Nevins, plaintiffs in the above action, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 10th day of March, 1966 in favor of the defendant against plaintiffs, against said plaintiffs, by order granting summary judgment in favor of said defendant.

/s/ Earl H. Davis
Attorney for Plaintiffs,
* * *

SERVE:

John F. Mahoney, Jr., Esq.,
* * *

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19,868

GLORIA I. NELSON, et al.,

Appellants,

v.

ELIZABETH THOMPSON SWIFT,

Appellee.

NO. 20,139

GLORIA I. NELSON, et al.,

Appellants,

v.

ELIZABETH THOMPSON SWIFT,

Appellee.

CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CHARLES E. PLEDGER, JR.
JOHN F. MAHONEY, JR.

925 Washington Building
Washington, D.C. 20005

Attorneys for Appellee.

STATEMENT OF THE QUESTIONS PRESENTED

In the opinion of appellee, the questions are:

1. With respect to the first suit, did the Lower Court abuse its discretion in denying plaintiffs' motion to reinstate this suit which had been dismissed for over four years where plaintiffs' only excuse for not taking one of several courses open to them to keep the case alive was that the defendant was out of the jurisdiction?

2. With respect to the second suit, was the Court below correct in granting summary judgment for defendant based on the bar of the three-year Statute of Limitations when this suit was filed by plaintiffs more than ten years after the cause of action accrued and where the tolling feature of this statute was inapplicable as defendant was a non-resident at the time the cause of action accrued?

BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,868

GLORIA I. NELSON, et al.,

Appellants,

v.

ELIZABETH THOMPSON SWIFT,

Appellee.

No. 20,139

GLORIA I. NELSON, et al.,

Appellants,

v.

ELIZABETH THOMPSON SWIFT,

Appellee.

Consolidated Appeals from the United States District Court
for the District of Columbia

EARL H. DAVIS

504 Federal Bar Building
1815 H Street, N. W.
Washington 6, D. C.

Attorney for Appellants

STATEMENT OF QUESTIONS PRESENTED

(1) In No. 19,868, — is it an abuse of discretion to deny reinstatement of an action for damages against an individual defendant which has remained unserved due to the absence from the country of said individual, such absence from the country having prevented the obtaining of service within the period of limitations — particularly when the Pre-Trial Examiner has recommended such reinstatement?

(2) In No. 19,868, — is it proper to deny relief from a final judgment (notation of dismissal, without prejudice, pursuant to Local Rule 13 for "failure to prosecute"), when counsel was unable to "prosecute" the action due to the absence from the country of the only defendant involved? Stated conversely, does the law require the doing of a useless and unnecessary act such as the issue of periodic alias summons when it is known that same cannot be served due to the defendant's absence from the country?

(3) In No. 20,139, — after a refusal to reinstate an original action dismissed pursuant to Local Rule 13 without prejudice, and the filing of a new action based upon the same grounds, where one District judge denied defendant's motion to dismiss predicated upon the grounds of Limitations of Action, holding that same involved questions of fact, is it proper for another District judge thereafter to effectively reverse the former District judge by granting defendant's motion for "summary judgment," based upon the same grounds as urged in the motion to dismiss?

INDEX

TABLE OF CASES

MISCELLANEOUS CITATIONS

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* Cases chiefly relied upon are denoted by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,868

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Appellee.

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Appellants,

v.

ELIZABETH THOMPSON SWIFT,

Appellee.

Consolidated Appeals from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

The parties to this appeal have been before this Court before, on this same litigation. On October 15, 1959, in — *Nelson, et al v. Swift*, 106 U.S. App. D.C. 238, 271 F.2d 504, this Court, in a *per curiam* opinion,

affirmed an order quashing service of process upon the defendant's (appellee's) common-law agent, who was the resident manager of an apartment building in the District of Columbia in which the tort occurred which is the basis of this action, and which building the defendant owned as an individual. The defendant was in Europe at the time said agent was served with process. Said affirmance, albeit reluctant, this Court stating – "Many states have statutes authorizing substituted service upon a non-resident property owner for private civil actions arising out of the property. Whether such a statute should be enacted for the District of Columbia is a matter which might well receive the consideration of Congress."

The defendant, by her own admission, was out of the country from June, 1958 until the Fall of 1963, when she returned and lived thereafter at various addresses.

After the return of the mandate on the original appeal, there was entered on the docket in the District Court, on January 9, 1961, a "Notation of Dismissal", reading – "Dismissed, without prejudice, pursuant to Local Rule 13, for failure to prosecute, as of 8/5/60." Signed Harry M. Hull, Clerk, by Helen C. Bendure, Deputy Clerk."

Neither appeallant nor their counsel received copy of this notation; but their counsel, through constant check on a companion case arising out of the same tort, filed one day after appellants' action had been filed, entitled "*George D. Deaner et ux v. Elizabeth T. Swift et al*", being Civil Action No. 1608-58, and being aware that the said defendant was still in Europe, noted that said defendant was served with process in the *Deaner* action on March 15, 1965.

Having no service in appellants' action (same having been quashed and such affirmed by this Court), appellants' counsel then filed, on April 16, 1965, a Motion to reinstate their action for the purpose of obtaining service of process, and presented a proposed order to that effect to District Judge Sirica, which was denied on April 19, 1965, by fiat, "without prejudice." Such Motion and proposed order had been presented *ex*

parte, since there was no defendant properly in the case, and consequently no counsel.

Thereafter the identical Motion to reinstate was again filed, but this time served upon original counsel for the defendant who had previously appeared only specially. Defense counsel then filed formal opposition thereto, and on September 27, 1965 the Assistant Pre-Trial Examiner filed a memorandum recommending reinstatement of the action for the purpose of obtaining service of process. Defense counsel then filed formal objections to the Recommendation of the Assistant Pre-Trial Examiner, which objections were orally argued by both sides before the District Court on October 19, 1965, and on October 21, 1965 an order was entered by the District Court (McGarraghy, J.) sustaining the said Objections, denying the plaintiffs' Motion to Reinstate the action, and Dismissing the action. Since this had the effect of terminating the litigation, Notice of Appeal from such action was filed on November 17, 1965.

The District judge made his ruling on October 19, 1965 to the effect set forth in the formal order entered October 21, 1965.

On the day following his ruling from the bench, plaintiffs (appellants), on October 20, 1965, re-filed the identical action against the same defendant, this time it being given Civil Action No. 2616-65. The defendant was served with process thereon on October 26, 1965, and on November 9, 1965 defense counsel filed a Motion to Dismiss (pleading the statute of limitations). This was formally opposed on November 17, 1965, and came on for oral argument on December 21, 1965, before District Judge Corcoran, who denied same, by order entered December 27, 1965. The defendant, by counsel, then filed her Answer, accompanied by certain Interrogatories to plaintiffs, which were duly answered by the plaintiffs on January 21, 1966. On February 4, 1966 the defendant, by counsel, then filed a Motion for Summary Judgment, alleging substantially the same grounds as in her prior Motion to dismiss. This came on for oral argument before Judge Sirica on March 2, 1966,

after which he took same under advisement, and on March 10, 1966 Judge Sirica entered an order granting defendant's Motion for Summary Judgment and entering judgment for defendant. Notice of Appeal therefrom was filed on March 16, 1966.

The United States District Court had jurisdiction of the original action under and by virtue of Title 11, Section 306, D. C. Code of Laws, 1961 Edition, as amended.

This Court has jurisdiction to review the judgments of the United States District Court, under and by virtue of revised Title 28, Sections 1291 and 1292, of the United States Code.

STATEMENT OF THE CASE

The "Statement of the Case" as presenting the questions on these consolidated appeals, actually appears in the Jurisdictional Statement. However, without repeating the facts set forth in the Jurisdictional Statement, appellants desire to supplement same by stating that this action was for damages for serious personal injuries sustained by both of them (third degree burns), as well as for certain property damage, against the defendant (their landlord), resulting from a fire in a stable-apartment located in the rear of 1730 New Hampshire Ave., N. W. in the District of Columbia on December 11, 1955. Said premises were then and had been since approximately 1947, owned and operated by the defendant individually as an apartment housing project. The defendant, at the time of the said fire, and prior thereto, was a resident of Chevy Chase, Montgomery County, Maryland, and had been employed in the District of Columbia with the Army-Navy Air Force Register, at 511 - 11th Street, N. W., in the District of Columbia. When the action was originally filed, the U. S. Marshal had been directed to effect service of process on the defendant personally at her employment address. However, the marshal's return as to service on the original summons stated — "Elizabeth Thompson Swift is not to be found in my District.

In Europe. Will return in about two years." Said return was filed on July 10, 1958. On July 18, 1958 the U. S. Marshal made his return that he had served the defendant copy of the summons and complaint by handing to and leaving a true copy thereof with Paul Smith Carter, agent, personally, at 1730 New Hampshire Ave., N. W., on July 18, 1958. It was this return that the District Court (Letts, J.) quashed, which was later affirmed by this Court on appeal.

As aforesaid, one George D. Deaner, an officer in the D. C. Fire Department, who had sustained serious injuries in the same fire, had filed suit through other counsel on June 20, 1958, under Civil Action No. 1608-58, naming Elizabeth T. Swift and her husband, Garfield C. Swift, as defendants, and listing their address as 3710 McKinley Street, N. W. in the District of Columbia. The very first return of the U. S. Marshal, on July 11, 1958, was to the effect — "Not to be found in my District. 3710 McKinley St. a vacant house." The next return of the marshal, on January 8, 1959 was to the effect — "Moved — Not to be found."

Yet thereafter, over the next six (6) years, some twenty (20) alias summons were issued, all directed to the same address, *i.e.*,— 3710 McKinley St., N. W., Washington, D. C.

In the *Deaner* case, the U. S. Marshal had made a return on April 16, 1964 — "Not to be found — moved out of country." On July 29, 1964, he made a return — "Not to be found — moved to Europe." On February 18, 1965 he made a return on another alias summons, "Not to be found — moved out of country." And finally, on March 15, 1965, he made a return that he had served both defendants therein at 5306 Reno Road, N. W., Washington, D. C.

It was just a month thereafter that appellants, through counsel, filed and presented their *ex parte* Motion to reinstate their action for the purpose of effecting service of process on the defendant personally.

STATEMENT OF POINTS ON APPEAL

1. The District Court (McGarraghy, J.) was guilty of an abuse of discretion when it reversed the Assistant Pre-Trial Examiner and denied appellants' Motion to reinstate their action.

2. The law does not require the doing of a useless or unnecessary act such as the issue of periodic alias summons to "keep alive" a complaint which cannot be served where it is known that the defendant is actually out of the country, when such alias summons are issued.

3. The District Court (Sirica, J.) erred in granting summary judgment to the defendant and in thus practically reversing his colleague (Corcoran, J.) who had denied defendant's Motion to Dismiss, both Motions being based upon substantially the same grounds.

4. Even with the lapse of time between the happening of the tort forming the basis of this litigation, there has been no prejudice to the defendant, as she still has to try the *Deaner* action, which, although calendared on April 9, 1965, has not yet been tried.

SUMMARY OF ARGUMENT

"Due process" requires only that the defendant has certain minimum contacts with the District of Columbia such that maintenance of the action does not offend traditional notions of fair play and substantial justice, and such contacts are to be tested by the quality, and not the number of activities. Wherefore, since the Congress has not seen fit, in the past seven years, to consider the passage of a statute authorizing substituted service upon a non-resident property owner for private civil actions arising out of the property, it is respectfully requested that this Court reappraise its holding in — *Nelson v. Swift*, 106 U.S. App. D.C. 238, 271 F.2d 504 (1959), and reverse same; and as to the instant appeals, that since the defendant has not been prejudiced, and the plaintiffs have not had their day in court, that the actions of the District Court be reversed and the cause remanded for trial on the merits.

ARGUMENT

When this Court affirmed the quashing of service of process against the defendant's common-law agent, on October 15, 1959, in *Nelson v. Swift*, 106 U.S. App. D.C. 238, 271 F.2d 504, and the record of the U. S. Marshal's return as to the original summons showed that the defendant was "In Europe. Will return in about two years.", there ostensibly was no-one against whom these plaintiffs could proceed.

Further, being aware that counsel in the companion case, Civil Action #1608-58, *Deaner v. Swift*, was in a similar predicament, and as of October 15, 1959, had issued at least six summonses for the same defendant, all of which had been returned "Not to be found", and was to issue another 17 summonses before he did obtain service, counsel for these appellants, knowing that there was no case "to prosecute" until the defendant became available for service, was obliged to await the happening of such contingency. The "Notation of Dismissal," entered on the docket as of January 9, 1961, "Dismissed, without prejudice, pursuant to Local Rule 13, for failure to prosecute, as of 8/5/60" was not served or received by either plaintiff or counsel. And even if it had been, the defendant could not have been served with process, because by her own affidavit she was even then, and until August of 1963, out of the country.

The Supreme Court has had occasion recently to comment upon the technicalities of the Federal Rules of Civil Procedure (and the instant appeals involve only a "local" rule of civil procedure):

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley v. Gibson*, 355 U.S. 41, 48, 2 L.Ed. 80, 86, 78 S. Ct. 99.

> The rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1." *Foman v. Davis*, 371 U.S. 178, 9 L. Ed. 2d 222, 225, 226, 83 S. Ct. 227 (1962).

Rule 60(b), F.R.C.P., provides as follows:

> "MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT: NEWLY DISCOVERED EVIDENCE: FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) *any other reason justifying relief from the operation of the judgment.* The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, Sec. 1655, or to set aside a judgment for fraud upon the court. Writs of *coram nobis, coram vobis, audita querela,* and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

The Supreme Court laid down the rules of construction to be applied to Rule 60(b), F.R.C.P., in *Klapprott v. United States* (1948), 335 U.S. 601, 69 S. Ct. 384, 93 L. Ed. 266. It was there held that sub-sections (1) and (6) were mutually exclusive — that is, if the circumstances alleged in a motion constituted excusable neglect as set forth in sub-section (1), the motion was restricted to that sub-section, and relief could not be granted under sub-section (6). Therefore, if the plaintiff can show no more than excusable neglect, the one-year time limitation will preclude the reinstatement of his action, but if the circumstances constitute more than excusable neglect, relief from the dismissal may be granted provided the motion was made within a reasonable time.

In *Lucas v. City of Juneau*, 20 F.R.D. 407 (1957), in granting a motion for reinstatement of a suit dismissed for lack of prosecution, it was held that Rule 60(b), F.R.C.P. authorizing a judge to relieve a party for "any other reasons justifying relief from operation of the judgment" does not apply only to "judgments"; but that, even if it did, an order dismissing a suit for lack of prosecution constituted such a judgment. In *Lucas, supra,* there had been proper service of process; the pleadings had put the case at issue; and there had been a date set for trial. However, plaintiff's attorneys had abandoned the case of their client, who was then under medical care outside the jurisdiction (in San Francisco), without notice to the client, and had permitted an order dismissing the case to be entered without the client's knowledge or consent.

In the instant appeals, the "Notation of Dismissal", entered in the minutes on January 9, 1961, "as of 8/5/60", was "without prejudice". "Without prejudice" to what? Counsel for appellants can only construe those words, under the extraordinary circumstances of this case, to mean without prejudice to prosecuting the action when and if the defendant became amenable to personal service of process within the jurisdiction. The action had been timely filed, and the defendant's absence from the country certainly tolled any applicable statute of limitations.

This Court has, on several occasions, granted relief under analogous circumstances.

In *Bridoux v. Eastern Air Lines, Inc.*, 93 U.S. App. D.C. 369, 214 F.2d 207 (1954), a motion was made by an alien to vacate a default judgment against him of $160,000.00 and to reinstate the action and his counter-claim for trial on the merits. The District Court denied the requested relief, and this Court, on appeal, *reversed,* holding that trial upon the merits is favored, and that slight abuse of discretion in refusing to set aside the default justified reversal of the order.

In *Williams v. Capital Transit Co.*, 94 U.S. App. D. C. 221, 215 F.2d 487 (1954), this Court affirmed the action of the District Court in setting aside of a default judgment and in quashing service of process, holding that such was timely, even though filed *three years* after the purported service of process.

In *Lafferty v. District of Columbia,* 107 U.S. App. D. C. 318, 277 F.2d 348 (1960), a proceeding on petition to review and expunge a decree adjudging the petitioner to be of unsound mind, was involved. The District Court rendered judgment adverse to the petitioner. On appeal, the Court *reversed,* holding that the petitioner's delay of some two and one-half years in instituting the proceedings for review of the decree adjudging him to have been of unsound mind after he learned of the decree which was entered without his having been afforded required statutory notice of hearing did not, under the circumstances, constitute unreasonable delay or a ground for denial of the requested relief.

In *Barber v. Turberville,* 94 U.S. App. D. C. 335, 218 F.2d 34 (1954), an attorney's failure to answer one of two cases given him by his client, resulted in a default judgment against the client in the sum of $10,000.00 on a charge of criminal conversation. The District Court refused to vacate the default. On appeal, this Court *reversed,* stating, at page 337:

> "That the defendant personally was not negligent in the protection of her interests seems clear from the facts recited. In situations such as are here disclosed, the courts have been reluctant

> to attribute to the parties the errors of their legal representatives."

It is to be noted also, in *Barber, supra*, that although Judge Prettyman dissented, in the very next case which considered the matter, namely,

L. P. Steuart, Inc. v. Matthews, 117 U.S. App. D. C. 279, 329 F.2d 234 (1964), petition for rehearing *en banc* denied March 9, 1964, which was some ten years after the decision in *Barber, supra*, Judge Prettyman was with the majority, in affirming the District Court's action in reinstating a suit which had been dismissed for want of prosecution, and holding that the trial court cannot abuse its discretion in thus reinstating the suit *some two years later* under the rule authorizing relief for any other reason justifying relief from operation of a judgment, where personal problems of counsel had caused him to grossly neglect a diligent client's case and to mislead the client.

Rule 60(b) of the Federal Rules of Civil Procedure was promulgated to protect a party from a final judgment which had not reached the merits, or had reached the merits in an unconscionable fashion, *i.e.*, fraud, mistake, or neglect. It is also for the protection of parties litigant when the sins of one's counsel should not be borne by the client.

This is graphically illustrated in the case of *In Re Cremida's Estate*, 14 F.R.D. 15, 17 (D. C., Alaska, 1953), wherein it was alleged in seeking relief from a final judgment that counsel was so drunk as to be incapable of properly presenting his case:

> "Relief from judgments, orders, or other proceedings rests in the sound discretion of the court and that discretion should ordinarily incline towards granting, rather than denying, relief. This is especially true if no intervening rights have attached in reliance upon the judgment and no actual injustice will ensue."

On abuse of discretion in refusing to set aside a default judgment, see also *Butner v. Neustadter*, 324 F.2d 783 (1963, 9 Cir.), citing *Brill v. Fox*, 211 Calif. 739, 297 P.25, 26 (1931), on the type of "discretion" involved.

On the question of the new action filed herein (Civil Action No. 2616-65), on the point of one District Judge in effect reversing another District Judge who had held that questions of fact were involved, on the issue of limitations, it is felt that but one citation is necessary, from the decisions of this Court, and that is the case of *Calvin v. Calvin*, 94 U.S. App. D. C. 42, 214 F.2d 226 (1954), in which this Court reversed the District Court (Letts, J.) for having granted summary judgment in an action to have a trust of realty set aside, this Court stating:

> "* * * * *While the pleadings on their face indicate that defendant relatives were non-residents of the District at the time of trial appellant raised the issue of their having been District residents when the causes of action accrued, with subsequent absence from the District. *This was a genuine issue of fact material to a decision on the question of limitation and precluded summary judgment as to such relatives.*" (emphasis ours).

This Court, in *Calvin, supra,* in a footnote 8, stated —

> "This distinguishes the case from *Reynolds v. Needle*, 77 U.S. App. D. C. 53, 132 F.2d 161, where the issue as to tolling of the statute had not been raised at the hearing on the motion for summary judgment."

The issue as to tolling of the statute had been raised before both Judge Corcoran (who denied defendant's motion to dismiss) and before Judge Sirica (who granted the motion for summary judgment), the point of both motions being substantially the same.

CONCLUSION

It is respectfully submitted, on the basis of the foregoing facts and authorities, that the District Court (McGarraghy, J.) erred in sustaining the Objections to the Pre-Trial Examiner's Recommendation reinstating Civil Action No. 1589-58, and in denying plaintiffs' motion to reinstate their action; and that the District Court (Sirica, J.) erred in granting

(Corcoran, J.) had denied the defendant's motion to dismiss on substantially the same grounds; and that for such errors this Court should reverse both such judgments, and remand Civil Action No. 1589-58 for the issue of process against the defendant, or remand Civil Action No. 2616-65 for trial on the merits, eliminating therefrom any question of limitation of actions.

Respectfully submitted,

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Attorney for Appellants

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19,868

GLORIA I. NELSON, et al.,

Appellants,

v.

ELIZABETH THOMPSON SWIFT,

Appellee.

NO. 20,139

GLORIA I. NELSON, et al.,

Appellants,

v.

ELIZABETH THOMPSON SWIFT,

Appellee.

CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

INDEX

TABLE OF CASES

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*Cases principally relied on by appellee.

COUNTERSTATEMENT OF THE CASE

For the purposes of this brief the parties will be referred to as they were below, appellants as plaintiffs and appellee as defendant, and as there are two suits, consolidated herein, seeking the same relief, they will be referred to, with regard to their filing dates, as the first suit and second suit respectively.

Plaintiffs filed their first suit against defendant, their landlord, on June 19, 1958 to recover damages for personal injuries sustained as a result of a fire allegedly caused by, among other things, defective electrical wiring in their leased apartment (J.A. 1, 3-5). The service upon defendant's rental agent was quashed by the Court below and the order appealed from was affirmed by this Court on October 15, 1959 (*Nelson v. Swift,* 106 U.S. App. D.C. 238, 271 F.2d 504). A certified copy of the judgment and opinion of this Court was filed below on November 2, 1959, and on January 9, 1961 this suit was dismissed under Local Rule 13 as of August 5, 1960 for failure of the plaintiffs to prosecute (J.A. 2)(their Brief, p. 2). Contrary to the statement in their brief that neither they nor their counsel were notified of the dismissal, the docket entries contain the symbol (N) which means "notified by mail" followed by the words (by Clerk). (J.A. 2)

On April 16, 1965, plaintiffs filed a motion to reinstate this suit without serving counsel for defendant with a copy thereof, which motion was denied without prejudice by Judge Sirica on April 19, 1965 (J.A. 6-8).

On August 3, 1965, plaintiff filed the same motion but with a certificate of service (J.A. 9, 10) which was opposed and argued before the Pretrial Examiner on September 24, 1965 who recommended that the motion to reinstate be granted (J.A. 10). Objections to the Pretrial Examiner's order were filed and the matter came on for hearing before Judge McGarraghy on October 22, 1965 (J.A. 12-16). In overruling the

Pretrial Examiner's recommendation, Judge McGarraghy stated (J.A. 16):

> "THE COURT: You had available to you during this more than four-year period several procedures that would have made it possible to keep the case alive. You could have issued alias summonses from time to time. You could have filed a motion to stay Rule 13. After the dismissal under Rule 13, you could have filed a motion to reinstate.
>
> "None of these things were done. The case was in the posture of being abandoned for a period of over four years. In my opinion, the case is stale and I think the Pretrial Examiner's ruling was erroneous. I will sustain objection to the Pretrial Examiner's ruling."

Plaintiffs filed a notice of appeal from the order of Judge McGarraghy denying the motion to reinstate (J.A. 17). Just prior to noting an appeal from this judgment, plaintiffs filed the second suit on October 20, 1965 seeking the same relief (J.A. 18, 20-22). Defendant filed a motion to dismiss this second complaint on the grounds that the claims asserted therein were barred by the three-year Statute of Limitations (J.A. 23). This motion came on for argument before Judge Corcoran and an order denying the motion was filed December 27, 1965 (J.A. 28). Defendant thereafter filed her answer to this second complaint (J.A. 28-29), asserting as an affirmative defense the bar of the Statute of Limitations; and, as apparently the question of the place of residence of the defendant was the deciding factor in denying defendant's aforesaid motion to dismiss, interrogatories propounded to the plaintiffs accompanied the answer. When the answers thereto were filed (J.A. 30) in which plaintiffs concede that the residence of the defendant at the time the cause of action accrued was the State of Maryland, defendant thereafter moved for summary judgment (J.A. 31-33). This motion was argued before Judge Sirica and granted on March 10, 1966 (J.A. 34). A notice of appeal from this order

was filed on March 16, 1966 (J.A. 34) and by order of this court dated June 1, 1966, the appeals from both suits were consolidated for briefing and argument.

STATUTES AND RULES INVOLVED

Title 12-301, D. C. Code, 1966 Ed., Supp. V:

"§ 12-301. *Limitation of time for bringing actions.*

"Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:

* * *

"(3) for the recovery of damages for an injury to real or personal property - 3 years; . . ."

* * *

Title 12-303, D. C. Code, 1966 Ed., Supp. V:

"§ 12-303. *Absence or concealment of defendant.*

"(a) When a person who is a resident of the District of Columbia is out of the District or has absconded or concealed himself at the time a cause of action accrues against him, the period limited for the bringing of the action does not begin to run until he comes into the District or while he is so absconded or concealed.

"(b) When such a person absconds or conceals himself after the cause of action accrues, the time of his absence or concealment may not be computed as a part of the period within which the action must be brought. (Dec. 23, 1963, 77 Stat. 511, Pub. L. 88-241, § 1.)"

Rule 60(b)(6) Fed. R. Civ. P.

"(b) * * * On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:

* * *

"(6) Any other reason justifying relief from the operation of the judgment.

* * *

Rule 13, United States District Court rules

"(a) *Dismissal Without Prejudice; Notice Of; Warning.* If a party seeking affirmative relief fails for six months from the time action may be taken to comply with any law, rule or order requisite to the prosecution of his claim, or to avail of a right arising through the default or failure of an adverse party, or take other action looking to the prosecution of his claim, or to file a certificate of readiness under Rule 11(d) within six months of the date the action is called on the call of the civil calendar, the complaint, counterclaim, cross-claim, or third-party complaint of said party, as the case may be, shall stand dismissed without prejudice, whereupon the Clerk shall make entry of that fact and serve notice thereof by mail upon every party not in default for failure to appear, of which mailing he shall make an entry. One month prior to the termination of the six month period the Clerk shall warn the dilatory party by mail that his claim will stand dismissed if he fails to comply with this rule, making an entry in the docket of the mailing. (Revised June 27, 1961)

"(b) *Failure to Warn; Effect.* A failure of the Clerk to give the warning as above provided will not affect the running of the six months' period or otherwise relieve a party from operation of this rule."

SUMMARY OF ARGUMENT

Following a dismissal of the first suit on February 5, 1960 (as of 8/5/60) the plaintiffs took no action to have it reinstated for over four years although several courses of action were open to them to accomplish this end. Plaintiffs could have issued periodic alias summonses or filed a motion to stay the operation of Rule 13 (quoted above) which prevents a dismissal of a suit for failure to prosecute, or after it was

dismissed, to file a timely motion to reinstate. This suit was in effect abandoned and as no "extraordinary circumstance" has been demonstrated by plaintiffs to justify reinstatement under Rule 60(b)(6) F.R.C.P., the Court below did not abuse its discretion in denying plaintiffs' motion to reinstate.

The second suit, filed about ten years after the cause of action accrued, was clearly barred by the three-year Statute of Limitations and the tolling feature of that statute is inapplicable as the defendant at the time the cause of action accrued was a resident of the State of Maryland. And, even if the tolling feature applied, plaintiff was a resident of the District of Columbia for over four years from the date the cause of action accrued until the filing of the second complaint.

ARGUMENT

I.

The court below did not abuse its discretion in denying plaintiffs' motion to reinstate the first suit as no extraordinary circumstance was shown to justify the application of Rule 60(b)(6), F.R.C.P.

When the original record of this case was returned from this Court to the lower Court and after a judgment for costs was entered on February 5, 1960, no action was taken by the plaintiffs for a period of six months thereafter and in accordance with Rule 13, United States District Court rules, quoted *supra*, the action was dismissed without prejudice.

A notation to this effect was made on the docket entries on January 9, 1961 with an indication that notice was sent to plaintiff's attorney by the Clerk on that date (J.A. 2). Nothing was done by plaintiffs to prosecute this action until four years later when on April 16, 1965 counsel for plaintiffs filed a motion to reinstate the cause without serving a copy thereof on counsel for appellee. (J.A. 6). This motion was denied by Judge Sirica on April 19, 1965 and the same motion was then prepared

and filed but this time with a copy served on counsel for defendant on August 3, 1965. (J.A. 10) The grounds for the reinstatement succinctly stated, were that defendant was in Europe for several years and the issuances of alias summonses would have been an empty gesture not required by law. However, as Judge McGarraghy pointed out at the conclusion of the argument on the motion to reinstate, there is more than one procedure available to keep a case alive where a party is absent from the jurisdiction: (J.A. 16)

> "THE COURT: You had available to you during this more than four-year period several procedures that would have made it possible to keep the case alive. You could have issued alias summonses from time to time. You could have filed a motion to stay Rule 13. After the dismissal under Rule 13, you could have filed a motion to reinstate.
>
> "None of these things were done. The case was in the posture of being abandoned for a period of over four years. In my opinion, the case is stale and I think the Pretrial Examiner's ruling was erroneous. I will sustain objection to the Pretrial Examiner's ruling."

There were three procedures available to plaintiff to preserve the life of the action below while the defendant was in Europe:

1. The issuance of periodic (every six months) alias summonses to the defendant (which is the most onerous);

2. Move the Court for an order staying the operation of Rule 13; or

3. If the action is dismissed under this Rule, file a timely motion to reinstate and then move for a stay order.

None of these procedures is esoteric. As a matter of fact, motions to stay the operation of Rule 13 are filed practically on a daily basis in the Clerk's office below.

Over four years after the dismissal, plaintiffs now seek a reinstatement on the grounds that defendant was in Europe unavailable for service of process.

Plaintiffs rely upon Rule 60(b) F.R.C.P. for relief (their Brief, p. 8). Reliance on grounds 1 through 3 of 60(b) F.R.C.P.: (1) Mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence, etc.; (3) fraud, etc., are conditioned upon a statutory period requiring the motion to be filed within one year from the date of the judgment or order taken. For relief under the "catch-all" clause (b)(6), there are two prerequisites: (1) the motion must be filed within a reasonable time, and (2) extraordinary circumstances must be shown. *Ackermann v. United States*, 1950, 340 U.S. 193, 202, 71 S. Ct. 209, 95 L. Ed. 207. In this case, judgments were entered denaturalizing respondents and about four years later they moved to have the judgments vacated. The District Court denied the motions which were affirmed on appeal. The Supreme Court granted certiorari and this Court, speaking through Mr. Justice Minton held that failure to appeal upon reliance of Alien Control Officer's advice to "hang on to" his home, which he would have to sell to meet the costs, did not meet the test of "extraordinary circumstances." The judgments were affirmed.

"Extraordinary circumstances" were demonstrated in *Klapprott v. United States*, 335 U.S. 601, 613-614, 69 S. Ct. 384, 93 L. Ed. 266, and discussed in *Ackermann v. United States, supra*, at p. 212, 71 S. Ct.:

> "The Klapprott case was a case of extraordinary circumstances. Mr. Justice Black stated in the following words why the allegations in the Klapprott case, there taken as true, brought it within Rule 60(b)(6): 'But petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere "neglect" on his part. The undenied facts set out in the petition reveal far more than a failure to defend the denaturalization charges due to inadvertence,

indifference, or careless disregard of consequences. For before, at the time, and after the default judgment was entered, petitioner was held in jail in New York, Michigan, and the District of Columbia by the United States, his adversary in the denaturalization proceedings. Without funds to hire a lawyer, petitioner was defended by appointed counsel in the criminal cases. Thus petitioner's prayer to set aside the default judgment did not rest on mere allegations of "excusable neglect." The foregoing allegations and others in the petition tend to support petitioner's argument that he was deprived of any reasonable opportunity to make a defense to the criminal charges instigated by officers of the very United States agency which supplied the secondhand information upon which his citizenship was taken away from him in his absence. The basis of his petition was not that he had neglected to act in his own defense, but that in jail as he was, weakened from illness, without a lawyer in the denaturalization proceedings or funds to hire one, disturbed and fully occupied in efforts to protect himself against the gravest criminal charges, he was no more able to defend himself in New Jersey court than he would have been had he never received notice of the charges.' Klapprott v. United States, 335 U.S. 601, 613-614, 69 S. Ct. 384 389, 93 L. Ed. 266."

Federal Deposit Insurance Company v. Alker, 1956, 3d Cir., 234 F.2d 113, 117:

"... it is clear that such an application for extraordinary relief must be fully substantiated by adequate proof and its exceptional character must be clearly established to the satisfaction of the district court before it can be granted by the court. The action of the Supreme Court in amending its judgment in Klapprott v. United States, 1949, 336 U.S. 942, 69 S. Ct. 384, 93 L. Ed. 266, indicates the procedure which is required to be followed in such a case."

Flett v. W. A. Alexander and Company, 1962, 7th Cir., 302 F.2d 321, 324, cert. den., 271 U.S. 841:

> "[6, 7] Rule 60(b) provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances. The district court did not abuse its discretion in denying relief under that rule in this case. . . ."

No authority is cited by plaintiffs for the proposition that a defendant's absence from the jurisdiction constitutes "extraordinary circumstances" within the meaning of this rule.

This Court in *L. P. Steuart, Inc. v. Matthews*, 1964, 117 U.S. App. D.C. 279, 329 F.2d 234, cert. den., 279 U.S. 824, found extraordinary circumstances to exist and affirmed the granting of relief under Rule 60(b)(6) in a case where personal problems of counsel caused him "grossly" to neglect a diligent client's cause and mislead the client. (But see: *Link v. Wabash Railroad Company*, 1962, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734.)

Nevertheless, the facts in *Steuart* are clearly distinguishable from those in the case at bar. Here plaintiffs' choice was free and deliberate and free and deliberate choices are not to be relieved from under 60(b)(6). *Ackermann v. United States, supra.* There was no intention of plaintiffs to do anything until such time as the defendant returned from Europe — hence the case would be dormant today unless the defendant had returned. There is no claim of gross neglect or inexcusable conduct. The plaintiffs, on the contrary, state that no action was required of them because the issuance of alias summonses would have been a useless gesture. No mention is made in their brief of the other courses of action which could have been taken to preserve the life of the action below.

As in *Steuart*, the question before this Court is whether the Court below abused its discretion on the basis of the record in denying the relief sought. Clearly no abuse is shown here.

II.

The second suit filed by plaintiffs was barred by the Statute of Limitations, as the tolling feature of that statute is inapplicable.

Plaintiffs filed a second suit on October 20, 1965 (J.A. 18), approximately ten years after the cause of action accrued. They contend however that the Statute of Limitations (Title 12-301, D. C. Code 1965 Ed.) was tolled during the absence of the defendant from the jurisdiction preserving their right to bring the action now.

> "§ 12-303. *Absence or concealment of defendant.*
>
> "(a) When a person who is a resident of the District of Columbia is out of the District or has absconded or concealed himself at the time a cause of action accrues against him, the period limited for the bringing of the action does not begin to run until he comes into the District or while he is so absconded or concealed.
>
> "(b) When such a person absconds or conceals himself after the cause of action accrues, the time of his absence or concealment may not be computed as a part of the period within which the action must be brought. (Dec. 23, 1963, 77 Stat. 511, Pub. L. 88-241, § 1.)"

It is conceded that defendant was a resident of the State of Maryland at the time the cause of action accrued. (J.A. 30, 32, their brief, p. 4.) Plaintiffs question the street address of defendant at the time of the fire but state on p. 4 of their brief:

> "The defendant, at the time of the said fire, and prior thereto, was a resident of Chevy Chase, Montgomery County, Maryland, . . ."

The affidavit of defendant attached to the motion to dismiss so states (J.A. 23-24).

In *Filson v. Fountain,* 1952, 90 U.S. App. D.C. 273, 197 F.2d 383, this Court held that since appellees were not residents of the District, D. C. Code, 1940, section 12-205 (superseded by the present Code section) which suspends the running of the statute while the defendant "who is a resident of the District" is out of it, has no application. Similarly, in *Frank v. Adams,* 1953, D.C. App., 98 A.2d 789, aff'd, 94 U.S. App. D.C. 174, 213 F.2d 198, adopted the opinion of the then Municipal Court of Appeals which stated on p. 790, 98 A.2d:

> "Thus we have a plain ruling that this exception to the statute of limitations is not available against non-residents. The decision makes no distinction between parties who are residents when suit is brought and those who are not, although we find on examining the pleadings in the transcript in that case that the defendants were residents when the action was filed. Therefore there seems to be no escaping the conclusion that this action is barred by limitations."

Moreover, as defendant's affidavit so indicates, she was here for over four years available for service before the filing of the second suit.

CONCLUSION

As no abuse of discretion has been demonstrated in the Court below in denying plaintiffs' motion to reinstate the first suit and as the three-year Statute of Limitations is clearly a bar to the claims asserted in the second suit, the judgments below should be accordingly affirmed.

Respectfully submitted,

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